Supreme Court, U.S.
FILED

NO. 09-839 NOV 5 - 2009

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In The
Supreme Court of the United States

SYBLE HOOD
AND TOM H. WHITESIDE,
Petitioners,

v.

EDWARD D. JONES & Co., L.P.
AND ROBBY ROGERS,
Respondents.

On Petition For A Writ of Certiorari
To The Eighth Court Of Appeals
of Texas

PETITION FOR WRIT OF CERTIORARI APPENDIX

TOM H. WHITESIDE
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Counsel for Petitioners

APPENDIX A

CAUSE NO. 14,971

SYBLE HOOD,	§	IN THE 109TH
Plaintiff,	§	DISTRICT COURT
v.	§	OF
EDWARD D. JONES	§	ANDREWS
& CO., L.P. §	§	COUNTY,
Defendants.	§	TEXAS

FINAL JUDGMENT

On the 24th day of October, 2006, this case was called for trial. Plaintiff appeared by and through her counsel of record, Tom H. Whiteside, of the Whiteside Law Firm. Defendant appeared by and through its counsel of record, R. Michael McCauley, Jr., of the firm of McWhorter, Cobb and Johnson, L.L.P. After a jury was impaneled and sworn, it heard the evidence and arguments of counsel. In response to the jury charge, the jury made findings that the court received, filed, and

entered of record. The questions submitted to the jury and the jury's findings are attached as Exhibit "A" and incorporated herein by reference for all purposes. Defendant Edward D. Jones & Co., L.P., made request of this Court for Judgment on the Verdict. The Court hereby renders Judgment for Defendant. It is therefore

ORDERED, ADJUDGED AND DECREED, that Plaintiff take nothing by her suit and that Defendant recover court costs from Plaintiff.

SIGNED ON THIS 3RD DAY OF JANUARY, 2007

/s/ James L. Rex

PRESIDING JUDGE

APPENDIX B

COURT OF APPEALS

EIGHTH DISTRICT OF TEXAS

EL PASO, TEXAS

	§	
IN RE: SYBLE HOOD,	§	No. 08-07-00068-CV
	§	AN ORIGINAL
	§	PROCEEDING
Realtor.	§	IN MANDAMUS
	§	
	§	

JUDGMENT

The court has considered this cause on the Realtor's petition for writ of mandamus against the Honorable Jams. L. Rex, Judge of the 109th District Court of Andrews, Texas, and concludes that Realtor's petition for writ of mandamus should be denied. We therefore deny the petition for writ of mandamus, in accordance with the option of this

court.

IT IS SO ORDERED THIS 22ND DAY OF MARCH, 2007.

/s/ Ann Crawford McClure

Justice, Court of Appeals for the

Eighth District of Texas

Before Chew, C.J., McClure, and Carr, JJ.

APPENDIX C

COURT OF APPEALS

EIGHTH DISTRICT OF TEXAS

EL PASO, TEXAS

	§	
IN RE: SYBLE HOOD,	§	No. 08-07-00068-CV
	§	AN ORIGINAL
	§	PROCEEDING
Realtor.	§	IN MANDAMUS
	§	
	§	

MEMORANDUM OPINION ON PETITION FOR WRIT OF MANDAMUS

Realtor, Syble Hood, seeks a writ of mandamus against the Honorable James L. Rex, Judge of the 109th District Court of Andrews County. Realtor has included a motion for emergency relief in her petition. Mandamus will lie only to correct a clear abuse of discretion. *Walker v.*

Packer, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). Moreover, there must be no other adequate remedy at law. *Id.* Based on the petition and record before us, we are unable to conclude that Realtor is entitled to the relief requested. Accordingly, we deny mandamus relief and the request for emergency relief. *See* TEX.R.APP.P. 52.8(a).

/s/ Ann Crawford McClure

Ann Crawford McClure, Justice

March 22, 2007

Before Chew, C.J., McClure, and Carr, JJ.

APPENDIX D

THE STATE OF TEXAS

THE SUPREME COURT OF TEXAS
Orders Pronounced June 1, 2007

ORDERS ON PETITION FOR MANDAMUS

THE FOLLOWING PETITIONS FOR MANDAMUS

ARE DENIED:

07-0245 IN RE SYBLE HOOD, REALTOR

APPENDIX E

THE STATE OF TEXAS

THE SUPREME COURT OF TEXAS
Orders Pronounced July 27, 2007

ORDERS ON PETITION FOR MANDAMUS

THE FOLLOWING MOTIONS FOR REHEARING

ARE DENIED:

07-0245 IN RE SYBLE HOOD, REALTOR

APPENDIX F

CAUSE NO. 14,971

SYBLE HOOD,	§	IN THE 109TH
Plaintiff,	§	DISTRICT COURT
v.	§	OF
EDWARD D. JONES	§	ANDREWS
& CO., L.P. §	§	COUNTY,
Defendants.	§	TEXAS

ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF UNDER TRCP 13 AND TRCP 166a(h)

On this day came on for consideration, Plaintiff's Motion for Relief Under TRCP 13 and TRCP 166a(h) filed October 27, 2006. This matter was originally scheduled for hearing on December 4, 2006, which hearing date was cancelled Plaintiff's counsel and rescheduled for hearing on February 14, 2007. The hearing was required to be rescheduled again which hearing ultimately occurred before this Court on October 16, 2007, at 1:00 p.m. Plaintiff

appeared by and through her counsel of record, Tom H. Whiteside, of the Whiteside Law Firm. Defendants appeared by and through their counsel of record, R. Michael McCauley, Jr. of the firm of McWhorter, Cobb and Johnson, L.L.P. After hearing arguments and evidence presented by counsel, the Court is of the opinion that Plaintiff's Motion for Relief Under TRCP 13 and TRCP 166a(h) should be in all things denied. It is therefore

ORDERED, ADJUDGED AND DECREED, that Plaintiff's Motion for Relief Under TRCP 13 and TRCP166a(h) is hereby in all things denied; it is further

ORDERED, ADJUDGED AND DECREED, that Plaintiff's Motion for Relief Under TRCP 13 and all supplements thereto were filed in violation of the Texas Rule of Civil Procedure 13 and TRCP 166a(h); it is further

ORDERED, ADJUDGED AND DECREED,

that Defendants are awarded attorneys' fees and expenses against Plaintiff's counsel and that Tom H. Whiteside of the Whiteside Law Firm shall tender to Defendants an amount of $3000 for attorneys' fees and an amount of $258.31 for attorney expenses, which amounts represent the fees and expenses incurred by Defendants as a result of Plaintiffs' Motion for Relief Under TRCP 13 and TRCP 166a(h) filed in violation of Texas Rule of Civil Procedure 13; it is further

ORDERED, ADJUDGED AND DECREED, that Defendants are awarded attorneys' fee and expenses against Tom H. Whiteside of the Whiteside Law Firm for any and all such cost incurred by Defendants for any appeal by Plaintiff of this Order in an amount up to $0, for each level of appeal, if Defendants prevail in the defense of such appeal; and it is further

ORDERED, ADJUDGED AND DECREED,

that all other relief requested by Plaintiff or Defendants not expressly granted herein is hereby denied.

SIGNED ON THIS 23RD DAY OF OCTOBER, 2007

/s/ James L. Rex

PRESIDING JUDGE

APPENDIX G

SYBLE HOOD, Appellant, v. EDWARD D. JONES & CO., L.P. AND ROBBY R. ROGERS, Appellees.

No. 08-07-00324

COURT OF APPEALS OF TEXAS, EIGHTH DISTRICT, EL PASO

2009 Tex. App. LEXIS 543

January 29, 2009, Decided

SUBSEQUENT HISTORY: Related proceeding at *Hood v. Edward D. Jones & Co., L.P., 2009 Tex. App. LEXIS 544 (Tex. App. El Paso, Jan. 29, 2009)*

PRIOR HISTORY: [*1]

Appeal from the 109th District Court of Andrews County, Texas (TC # 14,971).

JUDGES: Before Chew, C.J., McClure, J., and Barajas, C.J. (Ret.), sitting by assignment.

OPINION BY: ANN CRAWFORD McCLURE

OPINION

This appeal arises from a lawsuit filed by

Syble Hood against Edward D. Jones & Co., L.P. and Robby R. Rogers for wrongful discharge based on age discrimination. Summary judgment was granted in favor of Rogers on October 12, 2006. Two weeks later, Hood's claims against Jones were submitted to a jury, which returned a take-nothing judgment in Jones' favor. The next day, Hood sought relief pursuant to *Rule 166a(h)*[1] based on discrepancies between affidavits filed in support of Rogers' motion for summary judgment and trial testimony offered by rogers and other Jones' employees. She also filed a motion for sanctions pursuant to *Rule 13.* Over the next few months, Hood filed two supplements to these motions, a motion to compel discovery, two subpoenas *dueces tecum,* and additional request for production of

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1 ***Rule 166a(h)*** relates to summary judgment affidavits made in bad faith; "Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith . . . the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which caused him to incur, including reasonable attorney's fees . . ."
Tex.R.Civ.P. 166a(h)

documents. Appellees filed responses claiming attorney/client privilege, a motion to quash the subpoena *duces tecum,* a motion for protective order, and a request for expenses pursuant to *Rule 215.1(d).* Ultimately, [*2] the trial court denied relief to Hood and awarded attorney's fees and costs in favor of Appellees instead.[2] Hood and her attorney filed a joint notice of appeal. This appeal addresses only the denial of Hood's requested sanctions and the fees and costs awarded against her attorney.

FACTUAL SUMMARY

On April 18, 1990, Hood was employed as a Branch Office Administrator (BOA) of the Andrews, Texas office of Edward D. Jones & Co. She was 55 years old at the time she was hired. Robby Rogers was her manager and the Investment Representative [*3] for the office. Hood was fired on

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2 The propriety of the summary judgment in favor of Rogers and the denial of discovery under *Rule 166a(h)* are pending in a separate appeal before the Court, bearing cause number 08-07-00093-CV.

May 1, 1998 for insubordination, poor work performance, failure to perform ordered tasks, and absenteeism. On November 2, 1998, she filed suit alleging that she was wrongfully terminated based upon her age.[3]

The final judgment was signed January 3, 2007. Shortly thereafter, Hood filed a fifth request for production by which she sought:

Any documents in your "POSSESSION, CUSTODY, OR CONTROL" which reflect the IDENTITY of all persons or entities who participated in any way in drafting and/or making revisions to and final approval of Defendant, Robby Rogers' Motion for Lack of Jurisdiction and Motion for Summary Judgment and Brief in Support Thereof dated January 4, 2006 and the affidavits of Robby R. Rogers and Steve Rarick, attached as

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3 For our purposes here, an employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer discharges an individual. *Tex.Lab.Code Ann. § 21.051* (Vernon 2006).

Exhibit A and B thereto including, but not limited to, faxing, mailing or emailing of the drafts of the same or the final drafts of the motion and affidavits and any discussions of and decisions [*4] made by and between McWhorter, Cobb & Johnson, L.L.P., Edward D. Jones & Co., L.P, Kimber Monroe, and/or the Edward D. Jones' legal department, Steve Rarick and Robby R. Rogers or any other person or entity, their representatives, agents, servants and employees.

Any documents in your "POSSESSION, CUSTODY, OR CONTROL" which reflect all discussions of and all decisions made regarding all drafts and/or revisions and final approval for Defendant, Robby Rogers' Motion for Lack of Jurisdiction and Motion for Summary Judgment and Brief in Support Thereof dated January 4, 2006 and the affidavits of Robby R. Rogers and Steve Rarick, attached as Exhibit A and B thereto

including, but not limited to, faxes, mailed documents, letters of transmittal, memos, notes, emails by and between McWhorter, Cobb & Johnson, L.L.P., Edward D. Jones & Co., L.P., Kimber Monroe and/or the Edward D. Jones' legal department, Steve Rarick and Robby R. Rogers or any other person or entity, their representatives, agents servants and employees.

Appellees responded that the documents requested were privileged under *Rule 192.5* and *Rule of Evidence 503.* Hood countered with a motion to compel production and a motion to [*5] submit the documents to an *in camera* review. Appellees filed a request for expenses pursuant to *Rule 215.1(d).* On February 22, 2007, the trial court signed orders denying Hood's motions.

SANCTIONS

The sole issue presented is whether the trial court erred in denying Hood's motion for sanctions

and in awarding attorneys' fees and expenses to Appellees. The decision to impose *Rule 13* sanctions lies within the trial court's sound discretion. *Mattly v. Spiegel, Inc. 19 S.W. 3d 890, 895 (Tex.App.-Houston [14th Dist.] 2000, no pet.).* We will not set aside a sanctions order absent an abuse of discretion. *Id.* A trial court abuses its discretion by (1) acting arbitrarily and unreasonably, without reference to any guiding rules or principles, or (2) misapplying the law to the established facts of the case. *Downer v. Aquamarine Operators, Inc., 701 S.W. 2d 238, 241-42 (Tex. 1985).* We will overturn a trial court's discretionary ruling only when it is based on an erroneous view of the law or a clearly erroneous assessment of the evidence. *Id.* Our review encompasses an examination of the entire record. *Mercedes-Benz Credit Corp. v. Rhyne, 925 S.W. 2d 664, 666 (Tex. 1996).*

Rule 13 requires that a party [*6]

demonstrate that the pleadings are groundless, or that the opposing party brought the claim in bad faith or to harass the party. *Tex.R.Civ.P. 13.* "One purpose of the rule is to check abuses in the pleading process; that is, to ensure that at the time the challenged pleading was filed, the litigant's position was factually grounded and legally tenable." *Appleton v. Appleton, 76 S.W. 3d 78 86-87 (Tex.App. -Houston [14th Dist.] 2002, no pet.), citing Mattly v. Spiegel, Inc. 19 S.W. 3d 890, 896 (Tex.App. -Houston [14th Dist.] 2000, no pet.).* The trial court must examine the facts and circumstances in existence at the time the pleading was filed to determine whether *Rule 13* sanctions are proper. *Id.* Bad faith does not exist when a party merely exercises bad judgment or is negligent; rather, "it is the conscious doing of a wrong for dishonest, discriminatory, or malicious purposes." *Id.* Courts must presume the papers are filed in good faith, and the party moving

for sanctions bears the burden of overcoming this presumption. *Id.*

Denial of Hood's Request for Sanctions

At the hearing on Hood's motion, her attorney admitted that he had no evidence to support his claim that Appellees should be sanctioned. [*7] He testified to his personal belief that the affidavits were intentionally drafted so that Rogers could prevail on his motion for summary judgment. Counsel argued that someone had made the decision to include statements in the affidavits that were not true. Thus, he needed post-judgment discovery of the attorneys' files to gather the evidence he believed would establish bad faith. Once he found the evidence of bad faith, he could support his request for sanctions.

Hood had requested post-judgment relief under *Rule 13* and *Rule 166a(h)*. Her request derives from the purported contradiction between

affidavits in support of Rogers' motion for summary judgment and trial testimony of Rogers, Rarick, and Kranzberg. Simply stated, the issues is whether Rogers had the right to terminate employees without approval of the Human Resources Department. Hood alleges that the affidavits were not the result of mere bad judgment and negligence, but were consciously drafted and executed to obtain dismissal of the claims against Rogers, with Jones' employees knowing full well the statements were false. Appellees respond that the affidavits are not false merely because Jones has procedures in place requiring [*8] ratification by Human Resources. Alternatively, they argue that even if the statements were contradictory, it is not an indication of dishonesty or bad faith. *Appleton, 76 S.W. 3d at 86-87.* It is "the conscious doing of a wrong for dishonest, discriminatory, or malicious purpose," which must be shown for relief under *Rule 13.*

Campos v. Ysleta General Hosp., Inc., 879 S.W. 2d 67, 71 (Tex.App. -El Paso 1994, writ denied).

The trial court's decision to deny post-judgment discovery is not at issue in this appeal. Here, Hood only challenges the trial court's denial of her request for sanctions. In the absence of any evidence to support the sanctions ,we are hard pressed to conclude that the trial court abused its discretion.

Award of Fees and Costs

Hood briefly attacks the award of fees and costs, which she characterizes as *Rule 13* sanctions. She argues that Appellees were required to demonstrate bad faith and she complains that the trial court failed to identify any sanctionable conduct. Actually, Appellees requested relief pursuant to *Rule 215.1(d),* which provides in pertinent part:

(d) *Disposition of Motion to Compel: Award of*

Expenses.

. . .

If the motion is denied, the court may, after opportunity [*9] for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

The motions to compel and the motion for sanctions were filed by Hood. The trial court denied the motions and then considered Appellees' request for expenses. In determining the amount of attorneys' fees and reasonable expenses, the rule requires the court to "award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order

compelling compliance or in opposing a motion which is denied." *Tex.R.Civ.P. 215.1(d)*. Counsel for Jones testified that his firm had incurred $9,050 in attorneys' fees and $258.31 in expenses related to Hood's motions. The trial court ordered that Hood's attorney pay to Appellees $3,000 in fees and $258.31 in expenses, the reasonableness of which is not questioned here. Finding no abuse of discretion, we overrule the sole issue and affirm the judgment of the trial court. [*10] below.

ANN CRAWFORD McCLURE, Justice

January 29, 2009

APPENDIX H

Court of Appeals of Texas,

El Paso.

Syble HOOD, Appellant,

v.

EDWARD D. JONES & CO., L.P. and Robby R.

Rogers, Appellees.

No. 08-07-00093-CV.

Jan. 29, 2009

Rehearing Overruled March 4, 2009.

OPINION

ANN CRAWFORD McCLURE, Justice.

*1 This appeal arises from a lawsuit filed by Syble Hood against Edward D. Jones & Co., L.P. and Robby R. Rogers for wrongful discharge based on age discrimination. Summary judgment was granted in favor of Rogers on October 12, 2006. Two weeks later, Hood's claims against Jones were submitted to a jury, which returned a take-nothing

judgment in Jones' favor. The next day, Hood sought relief pursuant to Rule 166a(h)[FN1] based on discrepancies between affidavits filed in support of Rogers' motion for summary judgment and trial testimony offered by Rogers and other Jones' employees. She also filed a motion for sanctions pursuant to Rule 13. Over the next few months, Hood filed two supplements to these motions, a motion to compel discovery, two subpoenas *dueces tecum* [sic], and additional requests for production of documents. Appellees filed responses claiming attorney/client privilege, a motion to quash the subpoenas *duces tecum*, a motion for protective order, and a request for expenses pursuant to Rule 215.1(d). Ultimately, the trial court denied relief to Hood and awarded attorneys' fees and costs in favor of Appellees instead.[FN2] Hood and her attorney filed a joint notice of appeal. This appeal addresses only the summary judgment granted in favor of Rogers

and the denial of discovery under Rule 166a(h).

FACTUAL SUMMARY

On April 18, 1990, Hood was employed as a Branch Office Administrator (BOA) of the Andrews, Texas office of Edward D. Jones & Co. She was 55 years old at the time she was hired. Robby Rogers was her manager and the Investment Representative for the office. Hood was fired on May 1, 1998 for insubordination, poor work performance, failure to perform ordered tasks, and absenteeism. On November 12, 1998, she filed suit alleging that she was wrongfully terminated based upon her age. [FN3] In response to discovery requests, Appellees produced the names of all persons over fifty years of age who had been terminated by the company since 1990. Hood then requested, in electronic format, the following information from 1990 forward:

- the ages of all employees for each year;

- the gender of all employees for each year;
- the ages and gender for each job classification;
- any other data regarding company employees including age, sex, classification, hires, fires, retirements and terminations for any other reason;
- any analysis, assessment and/or survey made by the company regarding any of the above categories;
- company personnel or Human Resources practice and procedures manuals or any other documents which set forth the company's procedures regarding personnel including, but not limited to, hiring, firing, assessments of abilities, annual review, and prevention of age discrimination.

Appellees objected that the request was unduly burdensome; that the information had already been provided by hard copy; and that they did not have the ability to generate an electronic

version from the software system information.

*2 Some months later, Hood requested data concerning the termination of all BOAs since 1990 within all age groups. Appellees objected that this request was overbroad, burdensome, harassing, and irrelevant. At this point, Hood filed a motion to compel, arguing that the data was necessary to establish a statistical profile and to show that the company discharged BOAs at a higher rate once they passed age forty. Appellees objected again and estimated that compliance with the request would cost $12,365. [FN4]

On June 16, 2005, Hood filed an amended motion to compel in which she argued that a recent United States Supreme Court case stood for the proposition that disparate impact theory can be used in age discrimination cases, thus requiring the production of data for the termination of company employees over fifty years of age. *See Smith v. City*

of Jackson, 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005). The trial court granted the motion in part, and required Appellees to provide a list, by hard copy and e-mail if possible, of all employees between the ages of forty and fifty whose employment had been terminated between 1990 and 1999.

PROPRIETY OF SUMMARY JUDGMENT

[1][2][3][4][5] In her first issue for review, Hood complains of the summary judgment granted in favor of Rogers. We review a summary judgment *de novo. Valence Operating Co. v. Dorsett,* 164 S.W. 3d 656, 661 (Tex. 2005). The appropriate standard for a traditional summary judgment asks whether the movant carried the burden of showing that there is no genuine issue of material fact, so that judgment should be granted as a matter of law. *Diversicare Gen. Partner, Inc. v. Rubio,* 185 S.W. 3d 842, 846 (Tex. 2005); *De Santiago v. West Tex. Cmty.*

Supervision & Corr. Dep't, 203 S.W. 3d 387, 398 (Tex. App. -El Paso 20065, no pet.). We consider all the evidence in the light most favorable to the non-movant, indulging every reasonable inference in favor of the non-movant and resolving any doubts against the motion. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W. 3d 754, 756 (Tex. 2007). We also consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all the evidence presented. *Id.* at 755. Where, as here, a trial court does not specify the grounds upon which it relied in granting a summary judgment, we will affirm if any ground is meritorious. *See Harwell v. State Farm Mut. Auto Ins. Co.*, 896 S.W. 2d 170, 173 (Tex. 1995).

Hood sued Rogers for intentional interference with her contractual relationship with Edward D. Jones & Co. In his motion for summary judgment, Rogers argued (1) that he could not be sued in his

individual capacity under the Texas State Commission on Human Rights Act (TCHRA);[FN5] (2) that Hood had no enforceable contract with Jones; and (3) that Rogers was legally justified in terminating Hood. To prevail, Rogers needed to demonstrate that either no contract existed between Hood and Jones or that Rogers, as Jones' agent, could not have intentionally interfered with a contract between Jones and Hood.[FN6] If a contractual relationship did exist, Rogers would have to show that he was legally justified in interfering with another party's contract.

*3[6][7][8][9] Tortious interference with a contractual relationship requires a plaintiff to prove: (1) an existing contract subject to interference; (2) an intentional and willful act of interference; (3) proximate cause; and (4) actual damages. *Holloway v. Skinner,* 898 S.W. 2d 793, 795-96 (Tex. 1995); *Aguilar v. Morales,* 162 S.W. 3d 825, 837 (Tex. App. -

El Paso 2005, pet. denied). Texas strictly follows the employment-at-will doctrine. *Montgomery County Hosp. Dist. v. Brown,* 965 S.W. 2d 501, 501 (Tex. 1998); *East Line & Red River Ry. Co. v. Scott,* 72 Tex. 70, 10 S.W. 99, 102 (1888). "For well over a century the general rule in this State, as in most American jurisdictions, has been that absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all." *Montgomery County Hosp. Dist.,* 965 S.W. 2d at 502. Both Rogers and Steve Rarick, Senior Human Resources Generalist at the home office in Missouri, testified by affidavit that Hood was an at-will-employee and had no employment contract. Thus, Hood was subject to discharge for any reason unless prohibited by Texas or federal law.

[10][11][12] Citing *James E. Sterner v. Marathon Oil Company,* 767 S.W. 2d 686, 689 (Tex.

1989), Hood contends that her at-will employment relationship was subject to tortious interference. In *Sterner,* the court determined that third persons may tortiously interfere with an at-will contract that has yet to be terminated. *Id.* Other courts have held that *Sterner* is only applicable when third parties interfere with a contract between two independent entities or persons. *Atlas Copco Tools, Inc. v. Air Power Tool & Hoist, Inc.,* 131 S.W. 3d 203, 208 (Tex. App. -Fort Worth 2004) (recognizing *Sterner* applies only to third-party tortfeasors); *Kadco Contract v. Dow Chemical Co.,* 198 F.3d 241 (5th Cir. 1999) (holding that *Sterner* only applies to third party tortiously interfering with a person's at-will employment status). In Texas, a party cannot tortiously interfere with a contract to which he is already a party. *Hussong v. Schwan's Sales Enterprises, Inc.,* 896 S.W.2d 320, 326 (Tex.App. -Houston [1st Dist.] 1995, no pet); *Schoellkopf v.*

Pledger, 778 S.W. 2d 897, 902 (Tex. App. -Dallas 1989, writ denied); *Frost Nat. Bank v. Matthews,* 713 S.W. 2d 365, 369 (Tex. App. -Texarkana 1986, writ refused n.r.e.). For liability to attach, Rogers must have acted outside the scope of his employment. The record does not support this conclusion. Rogers was Jones' investment representative. When a corporate representative is acting within the scope of his employment, he cannot tortiously interfere with a contract between his employer and another individual or entity. *Gonzalez v. Gutierrez,* 694 S.W. 2d 384, 388-89 (Tex. App. -San Antonio 1985, no writ).

We come now to the purported discrepancies between the summary judgment affidavits. Rogers attested in his affidavit that:

*4 As the Investment Representative, I was responsible for the management of the Andrews branch office and I was the highest ranking

employee in that office. My responsibilities included human resource decision-making, including hiring and terminating of personnel and evaluations of employee work performance for employees under my supervision through ratification of Human Resources of Edward Jones.

. . .

On May 1, 1998, due to her failure to improve her job performance, as part of my job responsibilities for Edward Jones, I terminated Ms. Hood for insubordination, poor work performance, failure to perform ordered tasks and absenteeism, which was ratified be Mare [sic] Krantzberg [sic] in Human Resources at Edward Jones.

Steve Rarick stated in his affidavit that:

As the Investment Representative, Rogers was responsible for managing the branch office and was the highest ranking employee in that office. Rogers' responsibilities included human resource

decision-making, which included hiring and firing of personnel and evaluations of employee work performance for employees under his supervision. Rogers was responsible for making all personnel decisions related to employees at the Andrews Branch Office of Edward Jones.

Rarick's affidavit makes no mention of the necessity of Human Resources to approve or ratify employment decisions. Mary Kranzberg, a Human Resources Generalist at the home office, testified by deposition included in the summary judgment record that company policy required Rogers to obtain counseling and approval before discharging an employee. Rogers sought counseling and maintained extensive communications with Human Resources regarding Hood's employment situation. Rogers sought counseling and maintained extensive communications with Human Resources regarding Hood's employment situation, which Kranzberg

documented in her office notes. On May 6, 1997, Rogers contacted Kranzberg to discuss the progressive discipline process. Rogers indicated that his performance review should serve as a verbal warning with an expected improvement time frame of six months. Kranzberg encouraged Rogers to document his problems with Hood. On April 2, 1998, Kranzberg noted that she would prepare a final written warning based on the information Rogers sent her, provided it was warranted. On April 20, 1998, Kranzberg indicated in her notes that "Robby and I served the final written warning to Syble," and she placed a call to Rogers and Hood to discuss it. During the telephone conference, she advised that the company allows each and every Investment Representative to practice his own management style as long as it is not illegal or unethical.

The record reveals that Rogers followed the

proper "chain of command" required by company policy and did not act outside the scope or authority of his employment. Because Rogers was acting on behalf of the company, summary judgment was properly granted. We overrule Issue One.

DENIAL OF DISCOVERY

[13][14] We review discovery rulings for an abuse of discretion. *Owens-Corning Fiberglas Corp. v. Malone,* 972 S.W. 2d 35,42 (Tex. 1998); *Texas Dep't of Transp. v. Able,* 35 S.W. 3d608, 617 (Tex. 2000); *Avary v. Bank of Am., N.A.,* 72 S.W. 3d 779, 787 (Tex. App. -Dallas 2002, pet. denied). The oft-repeated standard is whether the trial court acted without reference to any guiding rules or principles. *See Downer v. Aquamarine Operators, Inc.,* 701 S.W. 2d 238, 241-42 (Tex. 1985). Absent a clear abuse of discretion, the trial court's ruling will not be disturbed on appeal.

Denial of Statistical Data

*5 [15] In Issue Two, Hood complains of the limitations the trial court placed upon discovery of statistical data. We understand the need for data to show a statistical profile in age discrimination claims. *Smith,* 544 U.S. at 228, 125 S. Ct. 1536 (finding disparate impact theory is applicable in age discrimination claims). In November 1999, Appellees provided Hood with the names and locations of all persons over fifty years of age who had been terminated by the company since 1990. Hood first sought the data for **all** employees discharged from 1990 forward via a motion to compel filed on July 7, 2000. She filed an amended motion to compel on June 16, 2005. She complains in her appellate brief that the trial court did not order the production of discharged employees between forty and fifty years of age until the day the jury trial began such that she could not make use of it during the presentation of her case. Appellees

take serious issue with this statement ,insisting that while the trial court signed the order that date, Appellees had already provided the documentation requested one year earlier. Hood has not disputed that assertion. Moreover, in her own time line included in her briefing, Hood lists no activity between June 14, 2001 and June 16, 2005. She has argued that issuance of the *Smith* opinion changed the dynamics of age discrimination lawsuits, but she admits that *Smith* applied to employees over the age of fifty. She had been in possession of that information since late 1999.

Hood argues that she needed the data concerning terminated employees in all age groups, but she does not detail the statistical analysis of the data she has already obtained. Were she to point to a trend of increasing termination contemporaneous with advancing age, we might be more inclined to agree. In the absence of any attempt by her to do so,

we decline to engage in wild speculation as to what the documents produced actually showed or that additional discovery was necessary to a proper presentation of her case. Because the trial court ordered significant and sufficiently tailored discovery, we perceive no abuse of discretion. We overrule Issue Two.

Denial of Discovery Related to Hood's Request for Sanctions

[16][17][18] Hood requested post-judgment relief under rules 13 and 166a(h). Rule 13 prohibits the filing of fictitious pleadings. We presume that all pleadings, motions, and other papers are filed in good faith, and except for good cause, sanctions may not be imposed. the burden is on the moving party to overcome this good faith presumption. *GTE Comms. v. Tanner,* 856 S.W. 2d 725, 731 (Tex. 1993). Under Rule 166a(h), if summary judgment affidavits are filed in bad faith or solely for the purpose of

delay, the court can award treasonable expenses which the filing of the affidavits caused the non-offending party to incur. In Issue Three, Hood challenges the denial of discovery necessary to her request for sanctions.

[19] Hood's request here also derives from the purported contradiction between affidavits in support of Rogers' motion for summary judgment and trial testimony of Rogers, Rarick, and Kranzberg. Simply stated, the issue is whether Rogers had the right to terminate employees without approval of the Human Resources Department. Hood alleges that the affidavits were not the result of mere bad judgment and negligence, but were consciously drafted and executed to obtain dismissal of the claims against Rogers, with Jones' employees knowing full well the statements were false. Appellees respond that the affidavits are not false merely because Jones has procedures in place

requiring ratification by Human Resources. Alternatively, they argue that even if the statements were contradictory, it is not an indication of dishonesty or bad faith. *Appleton v. Appleton,* 76 S.W. 3d 78, 86-87 (Tex. App. -Houston [14th Dist.] 2002, no pet.). It is "the conscious doing of a wrong for dishonest, discriminatory, or malicious purpose" which must be shown for relief under Rule 13. *Campos v. Ysleta General Hosp., Inc.,* 879 S.W. 2d 67, 71 (Tex. App. -El Paso 1994, writ denied).

*6 We find no abuse of discretion in the denial of post-judgment discovery. Hood is unable to point to more than a minor discrepancy between the affidavits and trial testimony, and the witnesses were available for vigorous cross-examination. Counsel has admitted that he had no evidence to support his motion for sanctions. The purpose of Rule 166a(h) is not served by allowing Hood to peruse the attorneys' files in a fishing expedition

launched the day after the jury returned a verdict against her. We overrule Issue Three and affirm the trial court's judgment.

BARAJAS, C.J. (Ret.) sitting by assignment.

FN1. Rule 166a(h) relates to summary judgment affidavits made in bad faith: "Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith . . . the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees . . . " TEX.R.CIV.P. 166a(h)

FN2. The denial of Hood's motion for sanctions, and the award of fees and costs to Appellees are pending in a separate appeal before the Court, bearing cause number 08-07-00324-CV.

FN3. For our purposes here, an employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national, origin, or age the employer discharges an individual. TEX.LAB.CODE ANN. § 21.051 (Vernon 2006).

FN4. The computer servers at the company contained the records of over 50,000 employees and the data sought would produce some 9,000 pages of documents.

FN5. The powers and duties exercised by the Commission on Human Rights are now exercised by the Texas Workforce Commission (TWC).TEX.LAB.CODE Ann. § 21.0015 (Vernon 2006).

FN6. Hood conceded in her response that Rogers could not be held individually liable for an age discrimination claim under TEX.LAB.CODE ANN. § 21.051.

APPENDIX I

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS

EL PASO, TEXAS

SYBLE HOOD,	§	No. 08-07-00324-CV
Appellant,	§	Appeal from the
v.	§	109th District Court
EDWARD D. JONES & CO., L.P. AND ROBBY R. ROGERS,	§	of Andrews County, Texas
Appellees.	§	(TC #14,971)

ORDER

The Court has considered Appellant's motion for rehearing and concludes that the motion should be denied.

IT IS SO ORDERED THIS 4TH DAY OF MARCH, 2009.

/s/ Ann Crawford McClure

ANN CRAWFORD McCLURE, Justice

Before Chew, C.J., McClure, J. and Barajas, C.J. (Ret.)

Barajas, C.J. (Ret.), sitting by assignment, not participating

APPENDIX J

COURT OF APPEALS

EIGHTH DISTRICT OF TEXAS

EL PASO, TEXAS

SYBLE HOOD,	§	No. 08-07-00093-CV
Appellant,	§	Appeal from the
v.	§	109th District Court
EDWARD D. JONES & CO., L.P. AND ROBBY R. ROGERS,	§	of Andrews County, Texas
Appellees.	§	(TC #14,971)

ORDER

The Court has considered Appellant's motion for rehearing and concludes that the motion should be denied.

IT IS SO ORDERED THIS 4TH DAY OF MARCH, 2009.

/s/ Ann Crawford McClure

ANN CRAWFORD McCLURE, Justice

Before Chew, C.J., McClure, J. and Barajas, C.J. (Ret.)

Barajas, C.J. (Ret.), sitting by assignment, not participating

APPENDIX K

THE STATE OF TEXAS

THE SUPREME COURT OF TEXAS

Orders Pronounced June 12, 2009

ORDERS ON PETITION FOR REVIEW

THE PETITIONS FOR REVIEW OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

09-0331 SYBLE HOOD v. EDWARD D. JONES & CO., L.P. AND ROBBY R. ROGERS from El Paso Count; 8th district (08-07-00324-CV, ___SW3d ___, 01-29-09)

APPENDIX L

THE STATE OF TEXAS

THE SUPREME COURT OF TEXAS

Orders Pronounced June 12, 2009

ORDERS ON PETITIONS FOR REVIEW

THE PETITIONS FOR REVIEW OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

09-0332 SYBLE HOOD AND TOM H. WHITESIDE v. EDWARD D. JONES & CO., L.P. AND ROBBY R. ROGERS from El Paso Count; 8th district (08-07-00093-CV, ___SW3d ___, 01-29-09)

APPENDIX M

THE STATE OF TEXAS

THE SUPREME COURT OF TEXAS

Orders Pronounced August 7, 2009

ORDERS ON MOTION FOR REHEARING

THE MOTIONS FOR REHEARING OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

09-0331 SYBLE HOOD v. EDWARD D. JONES & CO., L.P. AND ROBBY R. ROGERS from El Paso Count; 8th district (08-07-00324-CV, ___SW3d ___, 01-29-09)

APPENDIX N

THE STATE OF TEXAS

THE SUPREME COURT OF TEXAS

Orders Pronounced August 7, 2009

ORDERS ON MOTION FOR REHEARING

THE MOTIONS FOR REHEARING OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

09-0332 SYBLE HOOD AND TOM H. WHITESIDE v. EDWARD D. JONES & CO., L.P. AND ROBBY R. ROGERS from El Paso Count; 8th district (08-07-00093-CV, ___SW3d ___, 01-29-09)

APPENDIX O

United States District Court, D. Nebraska.

Katherine K. BOYER, Plaintiff,

v.

EDWARD D. JONES & CO., L.P., d/b/a Edward Jones, and Calvin A. Robinson, Defendants.

No. 7:01CV5008

March 31, 2003.

Name Expert: Daniel M. Wilson, M.D., Ph.D.

James D. McFarland, McFarland Law Firm, Lincoln, NE, for Plaintiff.

Fred A. Ricks, Jr., Harris, Dowell Law Firm, St. Louis, MO, Stephen W. Kay, Kay Law Firm, North Platte, NE, for Defendant.

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

LAURIE SMITH CAMP, District Judge.

*1 This matter is before the Court on the

Defendants' Motion for Summary Judgment on Claims I through IV of the Amended Complaint (Filing No. 54). Both parties have briefed the motion and submitted evidence in support of their respective positions (Filing Nos. 56 and 58-64). For the reasons provided below, the Court will grant the motion as it relates to the wrongful discharge claim of Count I of the Amended Complaint and deny the motion as it relates to Counts II, III, and IV of the Amended Complaint.

Procedural Background

On July 20, 2001, Plaintiff Katherine Boyer filed a petition in the District Court of Lincoln County, Nebraska, alleging that the Defendants Edward D. Jones & Co. ("Edward Jones") and Calvin Robinson wrongfully discharged her from her employment and failed to pay her for overtime that she had worked, and in so doing, violated state and federal laws. The Defendants removed the action on

August 16, 2001, pursuant to 28 U.S.C. § § 1331, 1441(c) and 1446(b). (Filing No. 1). On September 14, 2001, the Defendants moved to dismiss certain counts of the Complaint, and before the Court ruled on the motion, Boyer filed an Amended Complaint. The Court found taht the Amended Complaint rendered moot the Defendants' Motion to Dismiss and denied it. The Defendants filed a motion for reconsideration of that order, and the Court now denies the motion to reconsider as moot for the reasons provided herein on the Defendants' Motion for Summary Judgment. In effect, the proceedings have been stayed pending resolution of the summary judgment motion (Filing No. 70).

Factual Background

Edward Jones is a full-service retail brokerage firm. In 1985, after 18 years of employment with her former employer which had gone out of business, Katherine Boyer began looking for

employment. She applied for a job as a Branch Office Administrator at Edward Jones' North Platte, Nebraska, office. Boyer was interviewed for the position by Investment Representative Calvin Robinson, who would directly supervise the employee who filled the position.

During the interview, Robinson explained the job responsibilities, which included daily work on the Edward Jones computer system, answering the telephone, mail responsibilities, and arranging appointments with customers. (Boyer Dep. [FN1] at 64-65, 73-74; and Ex. 4). According to Boyer, Robinson explained to her that he was just starting the Edward Jones' office in North Platte, and he promised that if she stuck with him through tough times, then she would have permanent employment with Edward Jones as his assistant until her retirement. (*Id.* at 65-66). Boyer states that Robinson also promised her health insurance and

other employment benefits, including a 10-percent share of his periodic profitability bonuses, known as trimester profitability bonuses, if he were to earn them in the future. *Id.,* and at 85.

FN1. All references in the memorandum to deposition testimony will provide the witness's last name and page number to the deposition transcript. The transcripts are located in the record as follows: Pavlik and Armstead at Filing No. 56, Tabs G, K & L; Boyer at Filing Nos. 59-60; Robinson at Filing Nos. 61-62; Kadlecek at Filing No. 63; and Steve Rarick at Filing No. 64.

Accordingly to Edward Jones' policy, whether investment representatives pay a trimester profitability bonus to their own office administrators is a matter left wholly in the investment representative's discretion. (*Id.* at 83-87; Boyer Ex. 2). Boyer concedes that she had no

assurance that she would receive a trimester profitability bonus, and that it was dependent upon Robinson's profitability. (*Id.* at 85). Boyer's only claim to the bonus is through the representation that Robinson made to her at the time of her hiring. (*Id.* and 278).

*2 Boyer states that she relied on Robinson' promises when foregoing other employment opportunities and when accepting the position with Edward Jones. (*Id.* at 59-62). Boyer never received anything in writing stating that she could work for Edward Jones until she chose to retire, and she never received anything in writing that she would receive any specific level of bonus. (*Id.* at 72, 86, 202-3). Boyer has admitted that she knew that she could resign any time she wanted to resign, and she acknowledged that Edward Jones could have terminated her employment at any time. (*Id.* at 114-6, 201).

Boyer worked for Edward Jones and as Robinson's assistant from 1985 through February 14, 2000. During that period, Boyer Received annual performance evaluations from Robinson. For every year through 1998, Boyer received excellent performance evaluations from Robinson and always received the highest performance rating from Robinson. (Robinson Dep. at 42-63).

Boyer acknowledges that, on a few occasions, she agreed that Robinson could change their agreement on the bonus award. For example, there were times between 1985 and 2000 when Boyer told Robinson that he could raise her base rate of pay and forgo paying her a trimester profitability bonus. (Boyer Dep. at 184-85).

In 1997, a representative from Edward Jones inquired about the amount of overtime hours that Boyer had worked but for which she had not been paid. As a result of the company's inquiry, Edward

Jones compensated Boyer for the overtime she had worked but had not paid in 1997. (Robinson at 78-80). In 1998, Boyer claimed 2.5 hours of overtime per week, even though she had worked more overtime than claimed, because she understood that 2.5 hours was the maximum amount that she could claim. When, in January 1999, Robinson learned that she had claimed 2.5 hours of overtime per week in 1998, Boyer states that he confronted her about it, slammed his fist on the desk, and ordered her not to claim any more overtime because the overtime compensation that she received diminished Edward Jones' calculation of Robinson's overall income and profitability. (*Id.* at 95). After that conversation, although Boyer continued to work overtime hours, she did not claim them. (*Id.* at 97).

In January 1998, Jean Pavlik, who had been trained by Edward Jones in its St. Louis office, was assigned to be a second investment representative

for Edward Jones' North Platte office. For a time, Boyer was the office assistant for both Robinson and Pavlik. (Robinson Dep. at 93-94). In March 1998, Pavlik recommended that Connie Kadlecek, a 32-year-old female, be hired by Edward Jones as Pavlik's office assistant. Edward Jones approved the hire. (*Id.* and Pavlik Dep. at 11-12; Boyer Dep. at 127, 129-130). Kadlecek is a Nebraska native who had worked for approximately two years as a branch office administrator in an Edward Jones office in Colorado, and she was seeking to relocate back to Nebraska. (Kadlecek Dep. at 4-5).

*3 In May 1999, more than a year after Kadlecek had begun working at the North Platte office, Boyer took an annual vacation. When she returned to work, Kadlecek told her that in Boyer's absence, Robinson, Pavlik and she had a discussion about work assignments and they had decided that Kadlecek should take Boyers' job. (Boyer Dep. at

210). Kadlecek never stated when the transition was to occur, and Boyer testified that she thought Kadlecek was joking at the time she made the comment. (*Id.* at 212, 217).

In early 2000, Boyer discovered through checking her income tax records that she had been awarded fewer in bonuses for 1999 than she had been awarded in 1998 even though the North Platte office's profitability was greater in 1999 than in 1998. (*Id.* at 144-454). When Boyer asked Robinson the reason for the decrease, he told her that he had awarded a portion of her 10-percent profitability bonus to Kadlecek. (*Id.* at 148-49).

On February 9, 2000, Boyer and Robinson met again to discuss the profitability bonus awards. Robinson explained to Boyer that her had given a portion of the bonus to Kadlecek because Boyer had taken a ten week sick leave in 1999, and Kadlecek had performed Boyer's job duties during that leave.

(*Id.* at 149). Boyer told him that she had taken only nine weeks of leave, not ten weeks, and that she felt she was being punished for taking leave. (*Id.* at 150, 223-224). Robinson told Boyer to check with Edward Jones' branch office administrators in McCook and Grand Island to learn how much compensation they earned, because he was willing to make her the best paid office administrator in the region. (*Id.* at 163-64). When she checked with other Edward Jones' office administrators throughout Nebraska, she learned that she was not the best paid office administrator in the region.

According to Robinson, he told Boyer during that meeting that his payment to her of a share of his trimester profitability bonus was discretionary, and that he paid the bonus for showing up and working. To this comment, Boyer responded that maybe he should give her two weeks notice that she was quitting. (Robinson Dep. at 163). Boyer denies

that she ever threatened to quit- on that day or any day. (Boyer Dep. at 152).

On February 9 and 10, Boyer sold $43,000 in investments to pay off her margin account. (*Id.* at 155-59). On February 10, Kadlecek overheard Boyer talking on the phone. (Kadlecek Dep. at 66-67). During the conversation, Kadlecek heard Boyer say that if Robinson did not pay her the commission that she was owed, she would quit at the worst possible time for Robinson, in the middle of tax season. (*Id.* at 24-25, 27). Kadlecek reported what she had heard to Pavlik, who, in turn, told Robinson. (*Id.* at 24-25; Pavlik Dep. at 66-67).

Robinson and Boyer had another meeting to discuss Boyer's 1999 bonus on February 14, 2000. During that meeting, Robinson advised Boyer that he would not change the 1999 bonus payments, and that she would not receive a full 10 percent of the trimester profitability bonus for 1999. In response,

Boyer told him that she had 28 days of sick leave accumulated and five weeks of vacation, and that she was taking a few sick days. Robinson told her she could not use her sick time to leave work because she was not sick. Robinson told him that she had lost sleep the previous weekend, that she was sick, and that she was taking a couple days off for sick leave. According to Boyer, Robinson then told her to take her things with her when she left, which she interpreted to mean that she was being fired. According to Boyer, Robinson also said that if she tried to take any accounts with her when she left, Edward Jones would sue her. (*Id.* at 186-191, 276).

*4 Robinson recalled this key conversation differently. Robinson recalled that he asked Boyer whether she was coming back after her sick leave, and Boyer said, "no." (Robinson Dep. at 171-72; 220-21). Robinson testified that he considered Boyer's

departure a voluntary resignation, and he contacted Edward Jones' human resources office and told them that Boyer had resigned. Boyer also contacted Edward Jones' corporate human resources department. Edward Jones' associate relation's representative, Steve Rarick, told Boyer that the company considered her termination a voluntary resignation. (Rarick Dep. at 76-78).

Pavlik and Kadlecek were scheduled to open their own Edward Jones office in North Platter, separate from Robinson's office, on February 16, 2000. However, after boyer left the office on February 14, 2000, Pavlik suggested to Kadlecek that she apply for Robinson's vacant office administrator position because Kadlecek would have an opportunity to receive significantly greater compensation with Robinson than with Pavlik due to his greater volume of business. (Kadlecek at 38-41). Though she was initially reluctant to apply for

Boyer's former position, Kadlecek did apply and was given the job.

Boyer and Kadlecek both testified in their depositions that, from time to time, Boyer expressed her desire to retire from Edward Jones, Boyer was 55 years old (Filing No. 1).

SUMMARY JUDGMENT STANDARD

The Court must examine the record in the light most favorable to the nonmoving party i n the context of a summary judgment motion. *U.S. ex rel. Quirk v. Madonna Towers*, Inc., 278 f.3d 765, 767 (8th Cir. 2002). The proponent of a motion for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v.*

Catrett, 477 U.S. 317, 323 (1986) (quoting Fed.R.Civ.P. 56(c)). The proponent need not, however, negate the opponent's claims or defenses. *Id.* at 324-25.

In response to the proponent's showing, the opponent's burden is to "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed.R.Civ.P. 56(e)). A "genuine" issue of material fact is more than "some metaphysical doubt as to the material facts." *Id.* at 586.

Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.*, 477 U.S. at 327. Nevertheless, the Court's function is not to weight the credibility and

persuasiveness of evidence in the context of a motion for summary judgment. *Kampouris v. St. Louis Symphony Soc'y*, 210 F.3d 845, 847 (8th Cir. 2000).

ANAYLSIS

COUNT 1: Claim for Wrongful Discharge

*5 Defendants' seek summary judgment on Boyer's claim that she was wrongfully discharged in violation of state law. Nebraska is an at-will employment state, and the Nebraska Supreme Court has held that an employer may terminate the employment of an at-will employee at any time with or without reason without incurring liability, provided that such action is not constitutionally, statutorily, or contractually prohibited. *See, e.g.* *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 532 N.W.2d 316, 322 (Neb. 1995). While acknowledging that Nebraska recognizes oral contracts, the Defendants contend that because

Boyer cannot demonstrate that her alleged verbal agreement with Robinson had a definite term of duration, the agreement is not a legal contract such that it would take her out of an employee-at-will status. *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 517 N.W.2d 382 (Neb. 1994) (holding that promise of employment "until [employee's] retirement" was promise of employment for an *indefinite* term and therefore, the employee could be terminated at any time without employer liability), and *Goodlet v. Blue Cross & Blue Shield, Inc.*, 234 Neb. 5, 449 N.W.2d (1989) (holding that when employment is not for a definite term, there are no contractual or statutory limitations on the right of discharge.)

The Court is persuaded that there are no genuine issues of material fact at issue with regard to the duration of employment "agreement" that Boyer and Robinson discussed. Considering the

facts in the light most favorable to Boyer as the nonmoving party, she was intending to remain employed by Edward Jones "until Boyer decided to retire." Under Nebraska law, that statement is insufficient to create a definite term of employment. Accordingly, under Nebraska law there is not contract that would remove this case from an employment-at-will analysis.

Boyer argues that the Defendants are estopped from discharging her based on the holding in *Goff-Hamel v. Obstetrician & Gynecologists, Inc.*, 256 Neb. 19, 588 N.W.2d 798 (Neb. 1999). The Court disagrees. There is nothing in the record before the Court that demonstrates the kind of detrimental reliance necessary to state a claim based on the promissory estoppel exception to the employment-at-will doctrine set forth in *Goff-Hamel*. In Goff-Hamel, the plaintiff quit her job of more than 10 years in order to accept the offer of

employment with the defendant in that case. Several of ther terms of her new employment were negotiated, although the term and duration of her employment were not. The Nebraska Supreme Court held that the plaintiff was allowed to assert a theory of promissory estoppel in connection with the offer of at-will employment. *Id.* at 804. The facts surrounding Boyer's case are distinguishable from Goff-Hamel because Boyer did not resign her former employment based on the promise of employment with Edward Jones. Rather, she as already unemployed, having been laid off when her former employer went out of business. That she chose the Edward Jones' position over other positions because of a "promise" of better benefits and the hope of employment until she retired does not sufficiently demonstrate how her acceptance of that Edward Jones' offer worked to her detriment. To now argue that she passed up preferable employment

elsewhere to accept the Edward Jones' offer is speculative based on the record before the Court. For these reasons, the Court will grant Defendants' motion for summary judgment on the wrongful discharge claim.

COUNT II: Claim for Tortious Interference with Employment Contractual

*6 As a preliminary matter, the Court notes taht it previously dismissed the Defendants' Motion to Dismiss Count II of Plaintiff's Complaint as moot based on Boyer's amendment of her original Complaint. The Defendants asked the Court to reconsider its denial of their motion to dismiss (Filing No. 41), which the Court now denies, based in part of the reasons that follow.

The Defendants contend that Boyer's claim for tortious interference with an employment contract should be dismissed because there is no evidence that Robinson, against whom this claim is

solely alleged, interfered with Boyer's employment for any reason other than a lawful purpose of the employer. *See* *Huff v. Swartz*, 258 Neb. 820, 606 N.W.2d 461, 466 (Neb. 2000). Defendants contend that there is no evidence in the record that Robinson acted in furtherance of some individual or private interest in discharging Boyer.[FN2] The Court disagrees, and concludes that there are genuine issues of material fact relative to Robinson's purpose in his dealings with Boyer relative to her discharge from employment. Boyer has presented evidence that Robinson urged her not to claim overtime because payment of her overtime affected his personal income and profitability. In addition, a reasonable inference could be mad e that Robinson felt bound to his "agreement" to pay Boyer ten percent of his trimester profitability bonuses, but that he may not have felt compelled to pay Kadlecek a similar percentage. Given this disputed evidence,

the Court concludes that Robinson is not entitled to summary judgment on Boyer's tortious interference claim.

FN2. The Court recognizes that there are genuine issues of material fact regarding whether Robinson terminated Boyer or whether she voluntarily resigned.

Count III: Fair Labor Standards Act

Defendants also seek summary judgment on Boyer's claim that the Defendants have violated her rights under the Fair Labor Standards Act, 29 U.S.C. § 206 et. seq. ("FLSA"). The Fair Labor Standards Act requires that non-exempt employees be paid minimum wage, and generally, time-and-a-half for all hours over 40 hours worked in one week. 29 U.S.C. §§ 206, 207. *See also Bouchard v. Regional Governing Board of Region V Mental Retardation Servs.*, 939 F.2d 1323, 1327 (8th Cir. 1991). Defendants contend that Boyer is estopped from

claiming a violation of the FLSA because she was instructed in 1997 by Edward Jones' human resources representatives to claim as overtime all time in excess of 40 hours per week that she worked,, and because all time cards that she submitted to Edward Jones after that time were verified by her as being accurate. (Boyer Dep. at 89-90, 95, and Ex. 3). However, the Court finds that there is a genuine issue of material fact remaining as to whether Robinson instructed Boyer, subsequent to the human resource representative's 1997 instruction, *not* to record the overtime that she worked because it was coming out of his profitability and income. If Robinson instructed Boyer consistent with Boyer's testimony, and if she in fact worked overtime that she did not claim because of his instruction, then Boyer may have a claim under the FLSA. Because there remain genuine issues of material fact relative to this claim, the Court denies

Defendants' motion for summary judgment on Count III.

Count IV: Age Discrimination in Employment under State and Federal Law

*7 Boyer contends that Edward Jones violated her rights under the Age **Discrimination** in Employment Act, 28 U.S.C. 621 et. seq. ("ADEA") and Nebraska's Act Prohibiting Unjust **Discrimination** in Employment Because of Age, 48 Neb.Rev.Stat. § 1001 *et. seq.* The Nebraska Supreme Court has construed Nebraska's age **discrimination** act consistently with the ADEA, *see* *Billingsley v. BFM Liquor Management, Inc.*, 259 Neb. 992, 613 N.W.2d 478 (Neb. 2000), and, therefore, the Court will consider Boyer's age **discrimination** claims under ADEA and the *McDonnell Douglas* burden-shifting analysis.

To demonstrate a prima facie case under the ADEA, Boyer must show: (1) she is within a

protected class; (2) she was qualified to perform the office administrator position; (3) she was subjected to adverse employment action by Edward Jones; and (4) she was relaced by a younger employee. *Britton v. City of Poplar Bluff*, 244 F.3d 994 (8th Cir. 2001). It appears that, at least for purposes of this motion, all elements of Boyer's prima facie case except for the third element are conceded.

With respect to the third element, Defendants contend that they are entitled to summary judgment because Boyer cannot demonstrate that Edward Jones' decision not to award her a full 10 percent of the 1999 trimester profitability bonus is an "adverse employment action," and that she cannot demonstrate that her discharge from employment was involuntary. With regard to termination as an adverse employment action,[FN3] the Defendants contend that the undisputed facts establish that Boyer resigned. The Court disagrees and finds that

there are material facts in dispute regarding whether Boyer was voluntarily or involuntarily discharged, based upon the differences between Boyer's recollection of the vents surrounding the discharge and Robinson's recollection of those facts. (*Cf.* Boyer Dep. at 186-191 to Robinson Dep. at 220-21); *see also* Armstead Dep. at 14-17 and Ex. 102).

FN3. With regard to the bonus, Defendants argue that Boyer admitted that she knew the trimester profitability bonuses were wholly discretionary (Boyer Dep. At 83, 85, 87, 278) and that based on *Rabinovitz v. Pena*, 89 F.3d 482 (7th Cir. 1996), her loss of a portion of that bonus does not constitute an adverse employment action. It is true that the Seventh Circuit Court of Appeals has held that the "loss of a bonus is not an adverse employment action in a case . . . where the employee is not automatically entitled to the

bonus." *Rabinovitz*, 89 F.3d at 488-89.

However, because there are genuine issues of material fact remaining as to the nature of the bonus and whether it was "automatic" or not, this issue shall be tried.

If the Court assumes for purposes of this motion only that Boyer can successfully demonstrate her prima facie case, then the Court may inquire into Edward Jones' stated reason for her discharge. Edward Jones states that Boyer told them that she had resigned, and that she was discharged for this reason. However, given the differences between Boyer's testimony and Robinson's testimony relative to their final meeting, and the fact that Robinson was Boyer's supervisor at Edward Jones, the Court concludes that genuine issues of material fact remain for trial.

In addition, the following disputed facts weigh against granting summary judgment in this case: (1)

that Robinson allegedly inquired into Boyer's age at the time of her hiring, and again in January before her termination (Boyer Dep. at 63, 164); (2) that Kadlecek made a comment to Boyer about taking over Boyer's job without their supervisors' approval; (3) that a 32-year-old was immediately hired into Boyer's position; and (4) that Boyer made inconsistent statements to the Edward Jones human resources representative. Because the Court finds many material facts are genuinely disputed, Defendants' motion for summary judgment on the state and federal claims of age discrimination are denied.

*8 For all the reasons provided in this memorandum,

IT IS ORDERED:

(1) Defendants' Motion for Reconsideration (Filing No. 41) is denied;

(2) Defendants' Motion for Summary

Judgment (Filing No. 54) is granted in part and denied in part. Defendants' motion is granted as to Plaintiff's claim that she was wrongfully discharged as stated in Count I; and it is denied as to the remaining allegations of the Amended Complaint;

(3) Plaintiff's Motion in Limine (Filing No. 67) is denied without prejudice to reassertion at a date closer to trial, consistent with the Court's order of September 23, 2002 (Filing No. 70); and

(4) Defendant's Motion for Leave (Filing No. 68) to file a motion in limine out of time is granted, consistent with the Court's order of September 23, 2002 (Filing No. 70).

D.Neb., 2003

Boyer v. Edward D. Jones & Co. L.P.

Slip Copy, 2003 WL 25693573 (D.Neb.)